No. 23-927

In the Supreme Court of the United States

NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSE COMMITTEE,

Petitioner,

v.

COPYRIGHT ROYALTY BOARD, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* ADVANCING AMERICAN FREEDOM; AMERICANS FOR LIMITED GOVERNMENT; AMERICAN VALUES; ASSOCIATION OF MATURE AMERICAN CITIZENS ACTION; CENTER FOR POLITICAL RENEWAL; CENTER FOR URBAN RENEWAL AND EDUCATION (CURE); EAGLE FORUM; CHARLIE GEROW; INSTITUTE FOR REFORMING GOVERNMENT; INTERNATIONAL COUNCIL OF EVANGELICAL CHAPLAIN ENDORSERS; TIM JONES, FMR. SPEAKER, MISSOURI HOUSE, CHAIRMAN, MISSOURI CENTER-RIGHT COALITION; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; ROUGHRIDER POLICY CENTER; NEW JERSEY FAMILY FOUNDATION; RIO GRANDE FOUNDATION; SETTING THINGS RIGHT; THE ANGLICAN CHURCH IN NORTH AMERICA; 60 PLUS ASSOCIATION; AND RICHARD VIGUERIE IN SUPPORT OF PETITIONER

J. Marc Wheat
Counsel of Record
Timothy Harper (Admitted in DC)
Advancing American Freedom, Inc.
801 Pennsylvania Avenue, N.W., Suite 930
Washington, D.C. 20004
(202) 780-4848
MWheat@advancingamericanfreedom.com

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether approving noncommercial rates that favor NPR's secular speech over religious speech violates the Religious Freedom Restoration Act (RFRA) or the First Amendment.

2. Whether 17 U.S.C. 114(g)(4)'s bar on considering Webcaster Settlement Act (WSA) agreements in rate-setting proceedings extends to analyses valuing rates in non-WSA agreements.

3. Whether the Board's unexplained inversion of the burden of proof in a 17 U.S.C. 114(f)(1) ratesetting proceeding—including its unexplained new requirement of expert testimony to meet that burden—violates the Administrative Procedure Act.

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all men are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation."[2] AAF believes, as did America's Founders, that the First Amendment's protections of freedom of religion and freedom of expression are essential to ensuring the promises of the Declaration to all Americans.

Amicus curiae the Anglican Church in North America ("ACNA") unites some 100,000 Anglicans in nearly 1,000 congregations and twenty-eight dioceses across the United States and Canada into a single Church. It is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) and formally recognized by the GAFCon Primates – leaders of Anglican Churches representing 70 percent of active Anglicans globally. The ACNA is determined with God's help to maintain the doctrine, discipline,

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[1] No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of the filing of this brief.

[2] Edwin J. Feulner, Jr, *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

and worship of Christ as the Anglican Way has received them and to defend the God-given inalienable human right to free exercise of religion.

Amici curiae Americans for Limited Government; American Values; Association of Mature American Citizens Action; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Eagle Forum; Charlie Gerow; Institute for Reforming Government; International Council of Evangelical Chaplain Endorsers; Tim Jones, Fmr. Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; National Center for Public Policy Research; New Jersey Family Foundation; Rio Grande Foundation; Roughrider Policy Center; Setting Things Right; 60 Plus Association; and Richard Viguerie believe, as did America's Founders, that the power of government to act is justly limited by the fundamental rights of the people, including the rights to Free Exercise of religion and Free Speech.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Soon after the 1787 constitutional convention produced its draft, an author writing pseudonymously as Cincinnatus wrote a letter to James Madison arguing that suspicion of government expressed through free speech is essential to the preservation of liberty.[3] In doing so, Cincinnatus invoked one of Aesop's fables; one in which a pack of wolves is always kept at bay from the sheep by the dogs whose job it

[3] Letter from Cincinnatus to James Wilson (1787) in 5 *The Founder's Constitution*, 122 (Kurland and Lerner eds., Liberty Fund 1987).

was to protect the sheep.[4] The wolves say to the sheep, "Why is there always this hostility between us? If it were not for those Dogs who are always stirring up trouble, I am sure we should get along beautifully. Send them away and you will see what good friends we shall become."[5] The sheep send the wolves away and are promptly eaten by the wolves.[6] Cincinnatus believed that if the people surrendered the freedom of the press to the government, they, like the sheep, would be inviting their own destruction.[7]

Religious liberty, protected alongside freedom of speech and of the press in the First Amendment, is just as fundamental to a healthy and free society. The principle of "religious equality of all men and all creeds before the law, without preference and without distinction or disqualification," was "the great gift of America to civilization and the world, having among principles of governmental policy no equal for moral insight."[8] That legacy of liberty must be preserved and

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[4] The Aesop for Children, *The Wolves and the Sheep*, available at https://www.read.gov/aesop/144.html (last visited Mar. 24, 2024).

[5] *Id.*

[6] *Id.*

[7] Cincinnatus *supra* note 3 ("But you comfort us, by saying, – 'there is no reason to suspect so popular a privilege will be neglected.' The wolf, in the fable, said as much to the sheep, when he was persuading them to trust him as their protector, and to dismiss their guardian dogs. Do you indeed suppose, Mr. Wilson, that if the people give up their privileges to these new rulers, they will render them back again to the people?").

[8] Sanford Hoadley, *The Rise of Religious Liberty in America: A History*, 2 (Macmillan 1902).

fought for from one generation to the next. As President Reagan explained:

> Freedom is never more than one generation away from extinction . . . It must be fought for, protected, and handed on for them to do the same, or one day we will spend our sunset years telling our children and our children's children what it was once like in the United States where men were free.[9]

This case presents an opportunity for the Court to ensure that freedom is not suffocated by unreasonable and disparate fees imposed by the government on religious expression. The Copyright Royalty Board (CRB) is a government agency charged with setting default fees for webcasters that are playing copyrighted music over the internet. 17 U.S.C. § 114(f). When a webcaster and the holder of the copyright cannot agree on a price, the CRB's rates kick in. 17 U.S.C. § 114(f)(2).

The National Religious Broadcasters Noncommercial Music License Committee (NRBNMLC), which represents religious webcasters, proposed a fee arrangement as the default arrangement for noncommercial webcasters to the CRB as did SoundExchange, the representative of copyright holders with which NRBNMLC must negotiate. 37 C.F.R. 380.2(a). The CRB accepted SoundExchange's proposal despite the fact that it was

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[9] Ronald Reagan, Encroaching Control at 42:50 (Mar. 30, 1961) available at https://archive.org/details/RonaldReagan-EncroachingControl.

over 18 times higher than the rate SoundExchange had agreed upon with National Public Radio (NPR).[10] Because the large majority of noncommercial webcasters are religious, this disparate rate structure effectively privileges the secular expression of NPR and disadvantages the religious expression of the webcasters represented by NRBNMLC.

"Because First Amendment freedoms need breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)), the Court should grant certiorari in this case and rule for NRBNMLC.

ARGUMENT

I. The Liberty to Live According to One's Religious Convictions Without Fear of Government Discrimination is Protected by the First Amendment, is Deeply Rooted in the Nation's History and Tradition, and Has Long Been Recognized by this Court.

The right to religious liberty, and the clause of the First Amendment that protects it from government infringement, includes the freedom to live out one's religious beliefs without government discrimination because of that practice. As this Court reiterated in *Carson v. Makin*, "[t]he Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibition.'" 142 S. Ct. 1987, 1996 (2023) (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 450 (1988)).

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[10] Brief for Petitioners at 10.

The principle that the government must protect religious freedom rather than treat one religion as lesser than another religion or no religion was a well-established idea at the founding. At least one prominent perspective on religion at the Founding was that expressed by the Virginia Declaration of Rights: "religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence."[11] For that reason, "all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other."[12]

The Founders believed that, because a religious believer's obligation is to an authority higher than the state, the state has no competence interfering with the religious activity of the believer except in very narrowly drawn circumstances.[13] As Thomas Paine

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[11] George Mason, Virginia Declaration of Rights, Sec. 16 (1776) *reprinted in* The Founders Constitution, 70 (Kurland and Lerner eds., Liberty Fund 1987).

[12] *Id*.

[13] *See* James Madison, Memorial and Remonstrance (1785) *reprinted in* 5 The Founder's Constitution 82 (Kurland and Lerner eds., Liberty Fund 1987) ("The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every

explained, "As to religion, I hold it to be the indispensable duty of every government, to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith."[14] A government that follows this principle and thus tolerates a religious expression or identity is not thereby approving of that religion. As Montesquieu explained, "We are here politicians, and not divines; but the divines themselves must allow that there is a great difference between tolerating and approving a religion."[15]

Benjamin Franklin, too, explained both the history of that evil and the departure from that evil represented by the American tolerance of religious pluralism. Because religious tolerance was not widely known as an idea, "[p]ersecution was therefore not so much the fault of the sect as of the times. It was not in those days deemed wrong *in itself*."[16] Instead of tolerance, the general idea was that, while it was wrong for "those *who are in error* . . . to persecute *the*

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man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.").

[14] Thomas Paine, *Common Sense* (1776) *reprinted in* 5 The Founder's Constitution 69 (Kurland and Lerner eds., Liberty Fund 1987).

[15] Montesquieu, Spirit of the Laws, Book 25, Chapter 9 (1748) *reprinted in* 5 The Founder's Constitution 57 (Kurland and Lerner eds., Liberty Fund 1987).

[16] Benjamin Franklin, Letter to the London Packet (June 3, 1772) *reprinted in* 5 The Founder's Constitution 58 (emphasis in original) (Kurland and Lerner eds., Liberty Fund 1987).

truth . . . the *possessors of truth* were in the right to persecute *error*, in order to destroy it."[17] Of course, "every sect believe[es] itself possessed of *all truth*, and that every tenet differing from theirs was *error*," and thus thought it was their duty to suppress those with whom they disagreed.[18]

John Locke, similarly, understood the practical danger of giving government the power to treat disfavored religions, and thus disfavored views, unequally. "It may be said: *what if a church be idolatrous, is that also to be tolerated by the magistrate?* In answer, I ask: What power can be given to the magistrate for the suppression of an idolatrous church, which may not in time and place be made use of to the ruin of an orthodox one?"[19] That power to suppress which the government gains over all religions and no religion when it gains it over one such group is exactly the evil the First Amendment seeks to remedy.

Given this background, it is unsurprising that this Court has interpreted the First Amendment to mean that government discrimination solely on the basis of religion is "odious to our Constitution." *Carson*, 142 S. Ct. at 1996 (internal quotation marks omitted) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017)).

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[17] *Id.*

[18] *Id.*

[19] John Locke, A Letter Concerning Toleration (1689) *reprinted in* 5 The Founder's Constitution 55 (Kurland and Lerner eds., Liberty Fund 1987).

In 1940, the Court decided *Cantwell v. Connecticut* in which it invalidated a Connecticut law that required a license for religious solicitations but not for secular solicitations. 310 U.S. 296, 301-02, 311 (1940). The Court explained, "Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." *Id*. at 305.

In 1993, this Court protected religious liberty against a facially neutral law adopted for facially secular reasons. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court held that facially secular laws that nonetheless harm free religious exercise violate the protections of the First Amendment regardless of their facial neutrality. 508 U.S. 520 (1993). "At a minimum," the Court explained, "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id*. at 532.

The Court has continued, in recent years, to ensure that religious practice is not disfavored by the government. In *Ezpinoza v. Montana Dept. of Revenue,* 140 S. Ct. 2246 (2020) and *Makin*, 142 S. Ct. 1987, this Court held that states could not exclude religious schools from state tuition programs that were "generally available benefit[s], 'solely because of their religious character.'" *Makin*, 142 S. Ct. at 1997 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021).

Thus, both the philosophical precedents of the First Amendment and the decisions of this Court make clear that the government cannot treat some groups differently than others because of their religious beliefs. Because the Copyright Royalty Board did so here, as will be discussed in greater detail below, the Court should grant the NRBNMLC's petition for certiorari and rule in its favor.

II. The Centrality of Free Speech to Human Flourishing has Long been Recognized in American History and by this Court.

The purpose of "the Free Speech Clause of the First Amendment [is] to protect the 'freedom to think as you will and to speak as you think.'" *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 22310 (2023) (quoting *Boy Scouts of America v. Dale*, 530 U.S. 604, 660-61 (2000)). The Founders understood that free speech is both a worthwhile end in itself, and a means to a worthwhile end. *Id*. (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

The power to tax is the power to destroy.[20] Federal Farmer, the constitutional critic writing pseudonymously, expressed concern about the Constitution's lack of a protection of the freedom of the press noting, "All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by any taxes, duties, or in any manner whatever."[21] To those who argued that

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[20] *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819) ("An unlimited power to tax involves, necessarily, a power to destroy.").

[21] Federal Farmer No.16 (Jan. 20, 1788) *reprinted in* 5 The

Congress under the Constitution was given no power to infringe upon the rights of the press, the author responds, "By art. 1. sect. 8. congress will have power to lay and collect taxes, duties, imposts and excise. By this congress will clearly have power to lay and collect all kind of taxes whatever—taxes . . . on newspapers, advertisements, &c."[22] Because, "[p]rinting, like all other business, must cease when taxed beyond its profits," the "power to tax the press at discretion, is a power to destroy or restrain the freedom of it."[23]

So, too, the power to set fees and assess fines is the power to destroy. As the Court noted, "For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics learned several centuries ago." *Timbs v. Indiana*, 138 S. Ct. 682, 689 (2019) (citing *Browning-Ferris Indust. v. Kelko Disposal*, 492 U.S. 257, 267 (1989)).

The ability of people to speak freely is essential because no institution, much less the government, has a monopoly on the truth. As the Court explained in *West Virginia v. Barnette*, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of

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Founder's Constitution 123 (Kurland and Lerner eds., Liberty Fund 1987).

[22] *Id.*

[23] *Id.*

opinion or force citizens to confess by word or act their faith therein." 319 U.S. 624, 642 (1943). As Milton explained:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?[24]

Thus, "[a] commitment to speech for only *some* messages and *some* persons is no commitment at all." *303 Creative*, 143 S. Ct. at 1154 (emphasis in original). For the same reason, the Court has repeatedly recognized that the answer to speech with which one disagrees is not repression, but more speech. *See Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."); *United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012) ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth."). Human flourishing depends on more, not less.

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[24] John Milton, *Areopagitica* at 51-52 (John W. Hales ed., Oxford Clarendon Press 1894) (1644).

III. The Funding Scheme Hinders the Promulgation of Religious Expression in Contravention of the First Amendment and its Philosophical Precedent, and Thus Demands Review Under Strict Scrutiny.

Because the Copyright Royalty Board's rate setting imposes a significantly higher burden on noncommercial webcasting in general, the large majority of which is religious, than the agreement imposes on the secular NPR, this Court should grant the NRBNMLC's petition for certiorari to ensure that the principles of free speech and free exercise of religion, fundamental to American liberty, are protected against government disfavor.

This case represents the intersection of religious free exercise and freedom of speech, both protected under the First Amendment. The CRB sets default rates for webcasting copyrighted music. 17 U.S.C. § 114(f)(1). If the webcaster and the owner of the copyright can come to an agreement regarding the price, the CRB's price does not apply. However, if the two parties do not reach a deal, the CRB's rate is binding on the webcaster. 17 U.S.C. § 114(f)(2).

Here, National Public Radio (NPR) and SoundExchange reached an agreement that set a rate for NPR's webcasting.[25] On the other hand, when the NRBNMLC and SoundExchange proposed prices for religious webcasters, where the NRBNMLC's proposal was in line with the NPR agreement, the CRB adopted SoundExchange's proposal which imposed a fee

[25] Brief for Petitioners at 8.

structure over 18 times more expensive than the agreed-upon rate for NPR, and consistent with the fees imposed on commercial webcasters.[26] Further, NPR's bill is paid by the government, making it even harder for religious broadcasters, who have to pay their own bills, to compete.

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citing *Cantwell*, 310 U.S. at 311). Rather than breathing space, the rates imposed by the CRB here suffocate noncommercial religious broadcasters and their speech. As Federal Farmer recognized, the power to tax is the power to destroy. So, too, is the power to set the rates an organization must pay for its basic operations. Because the rates imposed here are so drastically disparate between the NPR on the one hand, and, on the other, the rest of the noncommercial webcasters, the overwhelming majority of which are religious, the Court should grant certiorari to ensure that the liberties protected by the First Amendment continue to thrive.

CONCLUSION

For the foregoing reasons, the Court should grant the National Religious Broadcasters' Noncommercial Music License Committee's petition for a writ of certiorari.

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[26] Brief for Petitioners at 10.

Respectfully submitted,

J. Marc Wheat
Counsel of Record
Timothy Harper (Admitted in DC)
Advancing American Freedom, Inc.
801 Pennsylvania Avenue, N.W., Suite 930
Washington, D.C. 20004
(202) 780-4848
mwheat@advancingamericanfreedom.com

Counsel for Amici Curiae